STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS GRACEY, JR.,

Defendant-Appellant.

UNPUBLISHED
October 2, 1998

No. 196573
Ingham Circuit Court
LC No. 95-069234 FC

Before: Jansen, P.J., and Neff and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to ten to fifteen years' imprisonment for his manslaughter conviction, and to a consecutive term of two years' imprisonment for his felony-firearm conviction. He now appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion to quash the information. His argument has two prongs. First, he claims that the order convening the multicounty grand jury that indicted him was invalid for lack of specificity. Another panel of this Court recently rejected this argument. *People v Morris*, 228 Mich App 380; 579 NW2d 109 (1998), lv pending. The panel in *Morris* concluded that there is no specificity requirement for orders creating multicounty grand juries. We agree with the holding in *Morris*, and, in any event, it is binding on us. Thus, the first prong of defendant's argument fails. Defendant also claims that the multicounty grand jury did not have jurisdiction to indict him because his crimes only occurred in one county. There is no authority for this contention. In fact, a multicounty grand jury is expressly authorized to indict for crimes occurring in only one county:

> A grand jury convened under [MCL 767.7(c); MSA 28.947(3)] may indict a person for an offense committed in any county over which the grand jury has jurisdiction. If the grand jury indicts a person under this subsection, the grand jury shall

> specify in the indictment the county or counties in which the offense took place. [MCL 767.23a; MSA 28.963(1).]

Thus, the second prong of defendant' argument also fails, and the trial court did not err in denying defendant' motion to quash.

Next, defendant argues that the trial court erred in admitting certain of his prior sworn statements. He argues that the statements should have been excluded under MRE 410, which states:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> (1) A plea of guilty which was later withdrawn;
>
> (2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea;
>
> (3) Any statement made in the course of any proceedings under MCR 6.302 or comparable state or federal procedure regarding either of the foregoing pleas; or
>
> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.
>
> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Parts (1) through (3) are inapplicable here, because the statements at issue were not made during the course of a guilty or nolo contendere plea. Instead, defendant claims that his testimony before a grand jury constitutes a "statement made in the course of plea discussions." We reject defendant's argument. Whatever the term "plea discussions" might encompass, we have no doubt that it does not include sworn testimony before a grand jury. Even if defendant testified with the belief or understanding that he would be offered a plea agreement, MRE 410 offers him no protection.[1] Thus, the trial court did not err in admitting defendant's statements.[2]

Defendant also argues that there was insufficient evidence to sustain his convictions. We disagree. In reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the

essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).

A voluntary manslaughter conviction requires proof sufficient to sustain a conviction for second-degree murder, along with evidence of provocation as a mitigating factor. *People v Darden*, ___ Mich App ___; ___ NW2d ___ (Docket No. 196697, issued July 10, 1998), slip op at 2-3, lv pending. The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325, amended on other grounds 453 Mich 1204 (1996).

Defendant challenges the sufficiency of the evidence on the intent and causation elements of manslaughter. We find no merit in defendant's arguments. The evidence at trial, when taken in a light most favorable to the prosecution, established the following: Defendant Thomas Gracey was also known as "Tee." In the early morning hours of October 26, 1993, defendant arrived at the house where codefendant Markey Walker was living. Defendant spent some time in the house with codefendant Walker and the victim. At some point, defendant, Walker, and the victim went outside. Two neighbors then saw the three men outside. The neighbors saw one of the men walk away, and heard one of the remaining men say "Tee, why you got a gun on me? Why you got a gun on me, Tee?" Shortly thereafter, the neighbors heard several shots, close together. One of the neighbors saw a flash right where the two people were standing when the shots were fired. A few minutes later, defendant was banging on the door of Walker's house, trying to get in. The victim died of a gunshot wound to the chest.

The above evidence, combined with defendant's own testimony, was sufficient to allow the jury to find, beyond a reasonable doubt, that defendant shot and killed the victim. The same evidence was sufficient to allow the jury to infer that defendant had the requisite intent for manslaughter. See *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995) ("Malice is a permissible inference from the use of a deadly weapon"). Finally, defendant's own testimony established that he possessed a firearm during the commission of a felony. Thus, there was sufficient evidence to support both of defendant's convictions.

Defendant makes three arguments regarding his sentence for voluntary manslaughter. First, he argues that he was denied the effective assistance of counsel when his attorney failed to challenge the trial courts scoring of the sentencing guidelines. Second, he argues that the trial court erred in scoring the guidelines. Last, he argues that his sentence was disproportionate. We resolve all three issues by simply noting that, after a review of the record, we believe that defendant's sentence was proportionate to the offense and the offender. Under these circumstances, the scoring of the sentencing guidelines is irrelevant. *People v Raby*, 456 Mich 487, 497-499; 572 NW2d 644 (1998); *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997).

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Peter D. O'Connell

[1] Defendant only argues that the admission of his grand jury testimony violated MRE 410. He does not argue that the prosecutor violated any plea agreement. In fact, it appears that defendant was offered a plea, but he refused it because he could not agree with the prosecutor regarding the amount of time he would serve.

[2] We note that the trial court reached this result by a different analysis than we have used, and that the trial court in fact excluded one of defendant's statements. To the extent the trial court admitted the statements, it reached the right result. Thus, we need not reverse. *People v Brake*, 208 Mich App 233, 242, n 2; 527 NW2d 56 (1994).